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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
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3 UNITED STATES OF AMERICA,  
4 *et al*,

5 Plaintiffs,

6 v.

24 Civ. 3973 (AS)

7 LIVE NATION ENTERTAINMENT,  
8 INC. and TICKETMASTER L.L.C.,

9 Defendants.

Teleconference

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10 New York, N.Y.  
11 March 13, 2025  
12 2:05 p.m.

13 Before:

14 HON. ARUN SUBRAMANIAN,

15 District Judge

16 APPEARANCES

17 UNITED STATES DEPARTMENT OF JUSTICE  
18 Attorneys for Plaintiff United States  
19 BY: JOHN R. THORNBURGH II  
20 BONNY E. SWEENEY

21 OFFICE OF THE ATTORNEY GENERAL FOR THE DISTRICT OF COLUMBIA  
22 Attorneys for Plaintiff District of Columbia  
23 BY: ADAM GITLIN

24 CRAVATH SWAINE & MOORE LLP  
25 Attorneys for Defendants  
BY: JESSE M. WEISS  
-and-

LATHAM & WATKINS LLP  
BY: TIM O'MARA  
ALFRED C. PFEIFFER JR.  
ROBIN L. GUSHMAN

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(Teleconference)

THE COURT: Good afternoon. We're here for a discovery conference in 24 CV 3973.

Let's have appearances of who's speaking.

So do we have Mr. Thornburgh?

MR. THORNBURGH: Good afternoon, your Honor.

Yes, this is John Thornburgh.

THE COURT: All right. Mr. Weiss and Mr. O'Mara, are you here?

MR. O'MARA: Yes, your Honor, Mr. O'Mara is here.

MR. WEISS: This is Mr. Weiss, your Honor.

THE COURT: All right.

Ms. Sweeney and Mr. Gitlin?

MS. SWEENEY: Good afternoon, your Honor.

This is Bonny Sweeney

THE COURT: Mr. Gitlin, are you with us?

All right. We'll move on for the moment.

Mr. Pfeiffer?

MR. PFEIFFER: Good afternoon, your Honor.

Al Pfeiffer here.

THE COURT: All right. Good.

So first thing, the pending motion to dismiss will be denied. An order will issue today or most likely with the docketing down in our docketing department tomorrow morning. You'll have that order on that motion.

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1 Now, on the matters that have been raised for today's  
2 conference, let's start with the motion to compel. And I'll  
3 give you my preliminary thoughts and then I'm happy to hear  
4 from both sides as to what I got wrong.

5 So I'm looking at the letter that was submitted at  
6 docket 472. And there are four requests for relief here.

7 As to number one, my understanding is that the  
8 defendants have -- are, in fact, going to produce the remaining  
9 priority custodian responsive documents by March 14th, and will  
10 produce at least 95 percent of all nonpriority custodial  
11 documents by April 15th. And they've said so in their letter,  
12 so that should be resolved and is moot.

13 As to the second request for relief, I agree with the  
14 defendants that they have to timely serve any subpoenas that  
15 they want to serve, but I'm not understanding how that -- why  
16 that should impede in any way the plaintiffs' efforts to take  
17 discovery, to take depositions in light of everything that's  
18 transpired in these cases.

19 If there's a request for a deposition, the third party  
20 wants to wait, you can either move to compel compliance with  
21 the subpoena or agree to wait. That's your call to make. And  
22 if later the defendants, having not timely served a subpoena to  
23 that third party, wants to do it later in time and the third  
24 party wants to complain, they can complain. Or the defendants  
25 can move to compel compliance and we'll deal with it at that

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1 juncture.

2 As to the third request for relief prohibiting delay  
3 to depositions, the defendants say they are not prohibiting  
4 delay and so they say there's no issue here. And that the  
5 plaintiffs, if they want to take depositions, they should move  
6 forward and take them. But I'll hear the parties out if  
7 there's something that I'm missing there.

8 As to the biweekly remote video -- or remote or video  
9 discovery status conferences, that seems fair in light of the  
10 advancing discovery and the fact that we're staring down on a  
11 discovery deadline and upcoming depositions, it probably makes  
12 sense to have biweekly conferences. I guess the question is  
13 whether the parties would want those conferences with the  
14 Court. I'm happy to do my best to accommodate, but we can  
15 address it if the parties would like the Court's attendance at  
16 those conferences.

17 So those are the four requests for relief.

18 Let me turn to Mr. Thornburgh to see if you have any  
19 issues with what I've said or want to clarify or you can tell  
20 me that I got everything wrong and should revisit everything  
21 that I just said.

22 MR. THORNBURGH: I won't be doing that, your Honor.

23 I do want to just clarify a few points in what you  
24 said and perhaps ask the Court to reconsider a few things here.

25 On number one, with regards to producing all remaining

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1 priority custodian documents, what defendants have said is that  
2 they will produce nearly all of them by March 14th. But  
3 there's one significant tranche of documents that remains  
4 outstanding, and that's an undefined volume of documents for a  
5 priority custodian for which plaintiffs had noticed a  
6 deposition in mid March. And defendants acknowledged in their  
7 letter there was a technical issue with that production, and  
8 defendants first informed plaintiffs of that a few weeks ago  
9 after plaintiffs' repeated prodding as to any remaining  
10 document issues. And defendants had indicated they would give  
11 us an update on that custodial production last night and how  
12 soon we could expect those documents and the volume of  
13 documents, and we still haven't gotten that update. And so,  
14 you know, without --

15 THE COURT: Mr. Thornburgh, who is the custodian?

16 MR. THORNBURGH: His name is Colin Lewis, your Honor.

17 THE COURT: Tom Lewis?

18 MR. THORNBURGH: Colin, C-O-L-I-N, Lewis.

19 THE COURT: All right. Thank you. Colin Lewis.

20 So Mr. O'Mara, do you want to pick that up. Where are  
21 Mr. Lewis's documents?

22 MR. O'MARA: Yes, your Honor.

23 So it's slightly more complicated and nuanced than  
24 just a technical issue.

25 What has happened with Mr. Lewis's documents, his

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1 laptop was timely collected, long before the January 15  
2 substantial completion deadline. And for unknown technical  
3 reasons, the collection was corrupted.

4 And when the defendants went to set up the  
5 re-collection, unfortunately, Mr. Lewis's house was one of the  
6 houses that burnt down in the L.A. fires. The laptop wasn't  
7 lost, but it obviously caused substantial delay in being able  
8 to get back in touch with him and then meet him and get his  
9 laptop and get it collected.

10 So there are sort of extenuating circumstances here  
11 which is led to why this one laptop is outstanding. It is true  
12 it's outstanding. It just finished processing last night after  
13 the collection. And we can report now that it's about --  
14 there's about 150,000 documents on that laptop. That's  
15 obviously the review set, not the responsive set. And  
16 obviously if you compare that to the 4.5 million documents we  
17 reviewed in the last four months, we think this is a relatively  
18 insignificant issue. But we can assure the plaintiffs and the  
19 Court that we are reviewing this expeditiously and will have it  
20 done very quickly or as quickly as possible.

21 THE COURT: As quickly as you'll turn over any  
22 responsive documents from that set by next Friday?

23 MR. O'MARA: I don't think that's quite possible, your  
24 Honor. I wouldn't want to commit to it, but I think we can  
25 probably do it in the next two weeks.

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1 THE COURT: All right.

2 Mr. Thornburgh, any objection or issue with two weeks,  
3 given the extenuating circumstances that Mr. O'Mara has  
4 indicated?

5 MR. THORNBURGH: No, your Honor.

6 But I would note that just so the Court has the full  
7 picture, plaintiffs two weeks ago, consistent with the Court's  
8 guidance going back to July, getting them documents in the  
9 door, having time for review, and then noticing depositions, we  
10 noticed seven party depositions for March, again, in light of  
11 the impending end-of-June fact discovery deadline.

12 And four of those seven depositions have been moved  
13 already to April by defendants. One is Mr. Lewis, another one  
14 I should acknowledge is Mr. Carnes. Plaintiffs moved that  
15 because of all the documents that were produced late. And then  
16 for two other deponents, defendants only offered their  
17 availability in May.

18 So the problem is one particular custodian, if that  
19 deposition moves, is not the end of the world; but the problem  
20 is these stack on top of each other and it is causing  
21 difficulties with plaintiffs' ability to timely complete  
22 depositions and discovery with the remaining time left before  
23 June 27.

24 THE COURT: Why don't you take the depositions, and  
25 then if you get a dump of documents for that particular witness

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1 that you weren't anticipating, make an application to the Court  
2 for a shorter follow-up deposition if you really needed it.  
3 Meaning that if something came out of that subsequent  
4 production that was really necessary, that broke the case open,  
5 you could make an application and I'd allow it. Nine times out  
6 of ten, you probably wouldn't have a need for that subsequent  
7 deposition because you probably covered most of the material  
8 issues at the outset given all the discovery that's happened.  
9 So you could just handle it that way. That way, you're not  
10 running into any timing issues and you'll have the facts that  
11 you need to proceed with expert discovery and everything else.

12 But if there's some sort of follow-up, meaning there's  
13 some, you know, super-hot, burning-your-fingers document that  
14 you get out of the subsequent production, all you need to do is  
15 make an application to take an out-of-time fact deposition and  
16 I'll understand, if there was some late production of documents  
17 and the documents are really important, that you can take that  
18 deposition. That's one way to handle it to alleviate the time  
19 issue, right?

20 MR. THORNBURGH: Yes, your Honor.

21 And again, that makes sense and plaintiffs will  
22 certainly do that.

23 As I said, I think just as I was trying to emphasize,  
24 part of the issue here is just the number of days left between  
25 today and June 27th and fitting in all of these depositions.



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1 But I certainly understand the point your Honor is making and  
2 we will do so as necessary.

3 THE COURT: All right.

4 So anything else, Mr. Thornburgh, that you wanted to  
5 revisit or that you had questions about?

6 MR. THORNBURGH: Yes, if you don't mind, your Honor.

7 On the nonpriority custodial documents by April 15th,  
8 there was an important caveat in defendants' letter, and I want  
9 to make sure we discuss it.

10 They said 95 percent of all documents except those in  
11 their privilege workflow. And based on defendants' prior  
12 productions, including the productions they made on  
13 January 29th, you know, two weeks after the substantial  
14 completion deadline, that was nearly 200,000 documents.

15 And so the concern is that defendants are going to  
16 have a quite voluminous number of documents in their "privilege  
17 workflow" that would not come until two weeks or many weeks  
18 after April 15. And again, that would likely, you know, delay  
19 depositions.

20 THE COURT: All right. Mr. O'Mara?

21 MR. O'MARA: So, your Honor, there's two things we're  
22 getting confused here, which is the production and review. And  
23 as to the January 15th deadline, without revisiting the whole  
24 back and forth with the plaintiffs that's set out in the  
25 briefs, obviously the target protocol called for review up

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1 through January 15th, by definition that means you're going to  
2 produce some of those documents after January 15th that fell  
3 within the next production date, which was January 29th.

4 So the January 29th, that 200,000, included two  
5 things: One, it included the documents that were reviewed and  
6 marked responsive on January 15th and in the short period  
7 before that that had not previously been produced. And it also  
8 included documents that were in the privilege workflow that had  
9 tentatively been marked privileged and then in the 2C process  
10 taken off that log. So that explains that number.

11 Looking forward to the April 15th deadline, what we  
12 have actually said in our letter is at this point in time we  
13 anticipate being 95 percent done with the production – not the  
14 review, but the production – by April 15. And what we expect  
15 to have outstanding at that point would largely be just the  
16 last little bit of stuff that was reviewed up to April 15th, as  
17 well as anything that would come off of the privilege log,  
18 which would be due on April 29th.

19 So, you know, those numbers will be what they'll be,  
20 but that's just still into the process. But, again, what our  
21 letter is saying is we expect by April 15th to be 95 percent  
22 done with production.

23 THE COURT: So just to make sure I understand, there's  
24 no carve-out from that 95 percent number.

25 MR. O'MARA: There's no carve-out, no. There's not.

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1 We expect to be 95 percent done with the production, depending  
2 on obviously what's tentatively marked privilege. And as we're  
3 doing the privilege log, stuff will come off of it; but we do  
4 not expect that to be a substantial number to change the 95  
5 percent production.

6 THE COURT: And whatever comes off of it, as you say,  
7 would be in the April 29th production, in any event.

8 MR. O'MARA: Correct. Correct.

9 THE COURT: Okay.

10 All right. Mr. Thornburgh, I think that addresses  
11 your issue, but let me know if you have any further question.

12 MR. THORNBURGH: I think so, your Honor.

13 I just want to make sure we're clear that what  
14 constitutes the denominator of the entire universe would  
15 include the "privilege workflow" that defendants' counsel was  
16 just referring to.

17 So in other words, my concern is -- our concern is  
18 that if the denominator is just made up of everything but the  
19 privilege workflow, then that really allows -- that could mean  
20 a quite voluminous number of documents are still outstanding as  
21 of April --

22 THE COURT: No. Mr. O'Mara, I understood that what  
23 you were saying is that on an ongoing basis, there are these  
24 documents that have been marked privileged that then are  
25 reviewed to make sure that they are, in fact, privileged.

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1 That's happening on an ongoing basis.

2 So what you're trying to communicate in your letter is  
3 that once you kind of finish with the production as of  
4 April 15, there is necessarily going to be that same kind of  
5 those loose ends that need to be tied up. But you're not  
6 saying that everything that has gone into the privilege  
7 workflow has basically been just kind of left there, and that  
8 starting April 15th, you are going to just go into this big  
9 tranche of documents that have never been touched and that  
10 you've been just kind of building up, and then start kind of  
11 reviewing. That's not what you're saying, right?

12 MR. O'MARA: That's correct, your Honor.

13 THE COURT: Okay.

14 Mr. Thornburgh, does that address your issue?

15 MR. THORNBURGH: I think so, your Honor. So long as  
16 we're all in agreement that the 95 percent means 95 percent  
17 inclusive of all documents that will ultimately be produced.

18 THE COURT: I think we're on the same page there.

19 But look --

20 MR. O'MARA: Actually, your Honor, I'm sorry. I'm  
21 being told by my team that I have that wrong. I'm sorry, your  
22 Honor. That's my mistake.

23 The 95 percent would be all nonprivileged documents.  
24 And so until the privilege review is done, that number might  
25 shift. But by April 15th we will be through the review, have

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1 produced 95 percent of all nonprivileged documents, subject to  
2 minor cleanup; and the two weeks following whatever has been at  
3 that point tentatively marked privileged will go through that  
4 process. If stuff is de-designated from it, it then gets  
5 produced on April 29th. That could shift the ultimate number,  
6 but it shouldn't shift it dramatically. As in shift the  
7 ultimate number of the total number of responsive nonprivileged  
8 documents that are ultimately produced by April 15th.

9 THE COURT: All right.

10 Mr. Thornburgh, so I think that you may have been  
11 right about what you were saying, but you're going to get the  
12 documents by April 29th is what Mr. O'Mara is saying.

13 MR. THORNBURGH: I hear that, your Honor.

14 I guess I'm just -- I'm still not clear whether  
15 defendants are obligated by April 15th to produce 95 percent of  
16 all the documents that will ultimately be produced for  
17 nonpriority custodians. I think that is the relief plaintiffs  
18 requested; and that is, you know, the relief we think makes  
19 sense. And again, the concern is that if you just exclude  
20 those privilege workflow documents, that could be any  
21 undetermined amount of documents that defendants have withheld  
22 in the first instance; and we just don't have any idea how many  
23 tens of thousands of documents or hundreds of thousands of  
24 documents that could be.

25 THE COURT: Mr. O'Mara, can you -- look, we're talking

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1 about two weeks here, and so I don't think that's going to be  
2 an issue. However, you should have a running total of what's  
3 in the privilege workflow, and that's something that you can  
4 provide to the plaintiffs so that you'll get a sense of what  
5 you think the volume of documents produced after April 15th  
6 will be. And, you know, let's provide that to the plaintiffs  
7 by, let's say, the first week of April.

8 And so if at that point it becomes clear that you're  
9 just kind of storing up all of the documents to be produced  
10 after the April 15 deadline, in an attempt to jam the  
11 plaintiffs up, which I don't think is what you're trying to do,  
12 then we can address it. And you can maybe put some more people  
13 on that review so that you can kind of quicken the pace. But  
14 if it's just a smattering of documents or that the volume is  
15 just immaterial in comparison to what's been produced from the  
16 nonpriority custodians, then this should not be an issue.

17 Does that make sense?

18 MR. O'MARA: It does, your Honor. We'll do that.

19 Thank you.

20 THE COURT: All right.

21 Mr. Thornburgh, what's next?

22 MR. THORNBURGH: Yes. So I want to, if we could, your  
23 Honor, talk about the nonparty subpoenas issue in the Court's  
24 ruling on the relief requested related to that.

25 I certainly understand the Court's perspective and

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1 what you're saying about our ability to, you know, go forward  
2 with the deposition or seek relief from the Court. I do want  
3 to emphasize, your Honor, though that the defendants' belated  
4 issuance of subpoenas and, in many cases -- even today -- kind of  
5 delay negotiations with nonparties over those subpoenas are  
6 impacting not only those nonparty productions to plaintiff,  
7 right -- so, for example, a nonparty, as we said in our letter,  
8 understandably does not want to go and collect documents and  
9 data more than once because it's burdensome and costly. And so  
10 defendants issued these subpoenas five or six months later.  
11 And so now the nonparty is having to wait to have those  
12 negotiations with defendants. That is pushing back any  
13 potential deposition of those nonparties to May or even June.  
14 And we obviously are anticipating taking additional  
15 deposition -- party depositions in May and June of nonpriority  
16 custodians and other nonparties.

17 And so the consequence of these belated -- not only  
18 the belated subpoenas, but, for example, your Honor, we  
19 understand that one of the ticketers the defendants reference  
20 in their letter, defendants issued them a subpoena in January.  
21 That ticketer provided responses and objections to the subpoena  
22 on February 23rd. And defendants, since February 23rd, have  
23 not engaged with the nonparty on the subpoena.

24 And so the concern is that those negotiations will  
25 continue to drag on and continue to make it difficult for

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1 plaintiffs to move forward with the depositions they need to  
2 take.

3 THE COURT: Yeah, but I'm not understanding why the  
4 defendants' delay in terms of pursuing their own discovery  
5 should matter to you.

6 Let me just put it this way: So if you've timely  
7 issued subpoenas to a third party, and the third party tells  
8 you, Well, I want to wait until I get whatever I get from the  
9 defendants, and the defendants aren't playing fair, then  
10 wouldn't you just first tell the third party, No, you produce  
11 it to us; and if you want to try to oppose the defendants'  
12 untimely efforts to subpoena you, you can do it, but we need  
13 these documents. And then we're going to seek a deposition.  
14 And the defendants will just be at a disadvantage because they  
15 won't have the documents that they are looking for.

16 I mean, isn't that how you would proceed? That's the  
17 reason why I didn't understand the issue.

18 Look, I understand that you're trying to work things  
19 out with all of these third parties. But from the defendants'  
20 perspective, unless there's some chicanery here, their point is  
21 that, Look, discovery is ongoing. And so it may be that they  
22 have requests that are valid that they want to serve. And  
23 their request, as long as they are timely, should not be  
24 dictated by when the plaintiffs subpoenaed those third parties.

25 And I get that, as long as it's not jamming you up.



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1 And I'm telling you that I wouldn't let them jam you up in that  
2 way.

3 MR. THORNBURGH: Your Honor, I think, to be frank, it  
4 is jamming us up. And the reason is because, you know, if it's  
5 one nonparty, your Honor, what you're suggesting makes sense,  
6 in that we push the nonparty to produce documents and say, you  
7 know, If you want to produce documents later in response to  
8 defendants' subpoena, you can do that.

9 But, again, it's costly and burdensome for a nonparty  
10 to collect documents and data more than once. It's not just  
11 one party, we're talking half a dozen – if not a dozen –  
12 nonparties saying in response to defendants' subpoenas issued  
13 in January and February, we're only going to go do our  
14 collections once. And so you gave us -- sure, plaintiffs, you  
15 gave us search terms and the data you requested back in  
16 October, November, maybe December. But now that we've gotten  
17 defendants' January or February subpoena, you know, we feel  
18 like we have to negotiate with them, and then we'll go do the  
19 document pull once.

20 And so as a consequence, all of those nonparties, it  
21 has a cumulative effect of slowing down all of the discovery.  
22 I get it, if it was just one nonparty, what your Honor is  
23 saying would make sense. But because there are so many  
24 subpoenas the defendants waited to issue until January and  
25 February, it's making it difficult – exceedingly difficult –

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1 for plaintiffs to schedule and move forward with nonparty  
2 depositions, you know, with the time remaining in discovery.

3 THE COURT: All right.

4 Mr. O'Mara, I mean, can you just get these  
5 cross-subpoenas out by March 21st -- or, let's see. Hold on.  
6 March 14th. It could be tomorrow, but let's say next week,  
7 okay? By next Friday, could you get these cross-document  
8 subpoenas out or the subpoenas that were served by  
9 February 28th. What's the problem there?

10 MR. WEISS: Your Honor, this is Jesse Weiss. I can  
11 address this issue.

12 So first, just to supplement what Mr. Thornburgh said,  
13 none of the subpoenas that we have issued are dilatory or late.  
14 We've issued some subpoenas --

15 THE COURT: Why don't you start by answering the  
16 question. Is there any reason why you can't get these out by  
17 next Friday? We're talking about subpoenas here. We're  
18 talking about cross-subpoenas relating to third parties that  
19 were subpoenaed prior to February 28th.

20 MR. WEISS: The issue there, your Honor, is that a  
21 number of nonparties that plaintiffs subpoenaed are still  
22 producing documents. The approach that we've take -- and we  
23 understand for some of them we're still negotiating search  
24 parameters and collection parameters with plaintiffs.

25 The approach that we've taken has been not to issue

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1 150 nonparty subpoenas, but to approach nonparty discovery in a  
2 more targeted way.

3 The prejudice that we are trying to avoid with putting  
4 in an arbitrary date is if a nonparty produces documents, and  
5 we determine upon review of that that some targeted  
6 supplementation is warranted, we don't believe that we should  
7 be cut off from seeking that targeted supplementation. So  
8 that's the reason why a deadline of next week would be  
9 problematic. There are still documents coming in from  
10 nonparties, and plaintiffs have subpoenaed prior to  
11 February 28th.

12 MR. THORNBURGH: Your Honor, may I speak to that  
13 briefly?

14 THE COURT: Sure.

15 MR. THORNBURGH: If defendants were issuing narrowly  
16 tailored document subpoenas to entities to follow up on  
17 individual things they needed, that would be one thing. But  
18 that's not what the defendants are doing or have done.

19 Defendants have issued overly broad subpoenas going  
20 back to January -- we're talking 70 sets in some instances, that  
21 failed to take into account any of the documents that the  
22 nonparties had produced in response to plaintiffs' subpoenas.

23 And so it's not just asking, you know, a nonparty to  
24 go grab, you know, some additional one data field or, you know,  
25 some -- go get particular presentations or something like that.

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1 The subpoenas are so broad that, you know, when nonparties get  
2 them, they say, Okay. Well, now we have to have this full long  
3 negotiation with defendants. And so, therefore, plaintiffs,  
4 we're not going to produce any of our documents -- any  
5 additional documents in response to your subpoena until we  
6 finish those negotiations; and therefore, any depositions  
7 cannot occur until well after that.

8 And so again, it's slowing down the entire process.

9 THE COURT: And, Mr. Thornburgh, I take it that what  
10 you're saying is, Defendants, just get your subpoenas out by  
11 March 21st, because once you get them out, to the extent that  
12 Mr. -- to address Mr. Weiss's concern, there is some follow-up  
13 or something that wasn't produced, you will have already served  
14 your subpoena. And then you can go get that targeted follow  
15 up. There are these spreadsheets from this time period that  
16 you're missing in your production; could you go provide those.  
17 Right? That's what you're saying. Meaning that your proposal  
18 is not exclusive of that kind of targeted follow-up later; in  
19 fact, having served the subpoenas, the defendants could then  
20 try to go get that follow-up in accordance with the subpoenas  
21 they already served.

22 MR. THORNBURGH: That's exactly right, your Honor.

23 MR. WEISS: Your Honor, can I just address it?

24 THE COURT: You can briefly address it, but I don't  
25 see why that doesn't make sense, but do your best.

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1 MR. WEISS: Plaintiffs have served subpoenas on over  
2 150 nonparties. A sizable number of those will not have  
3 particular relevance to nonparty discovery between now and the  
4 end of June.

5 So if we have a deadline of March 21st, and just issue  
6 as many subpoenas as we can between now and then without taking  
7 any targeted approach, we're going to be subpoenaing nonparties  
8 who may not need to receive subpoenas from defendants. So it  
9 creates a burden on everyone, including a nonparty, to require  
10 us to proceed in that more sweeping nontargeted way.

11 I have to correct the record. The subpoenas that we  
12 issued to date have been targeted. Some of them have had more  
13 requests than others; but in our meet-and-confers with the  
14 nonparties, we have been narrowing our requests to the targeted  
15 supplementation that we think we need. And that's what we  
16 would like to continue to be able to do.

17 THE COURT: All right. I understand.

18 So I will modify what I said previously and require  
19 the defendants by March 21st to issue all of their  
20 cross-document subpoenas to entities plaintiffs subpoenaed  
21 prior to February 28th.

22 Mr. Weiss, I hear you on the concern that you've  
23 raised. But the plaintiffs are asking for this relief, even if  
24 it might result in more subpoenas going out.

25 But I think their point is that having served these

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1 subpoenas before February 28th, it would be apparent to the  
2 defendants where those subpoenas do not address those targeted  
3 documents that you're talking about. And so you would be able  
4 to issue targeted subpoenas, which is what you want to do – you  
5 don't want to just flood the zone with subpoenas that are  
6 indiscriminate.

7 But what they are saying is you can look at the  
8 plaintiffs' subpoenas; and to the extent that there's something  
9 missing that you think you need, then you'd be able to issue  
10 your cross-subpoena to address those targeted areas. And we're  
11 at the current time only talking about those subpoenas that  
12 went out prior to February 28.

13 All right. So I'll modify what I said previously on  
14 that basis and that will be reflected in the Court's order.

15 Mr. Thornburgh, anything further?

16 MR. THORNBURGH: The only last thing is just to go  
17 back to the privilege workflow issue, your Honor. We would ask  
18 that the Court make defendants in their biweekly document  
19 production updates to the Court include those document figures  
20 in that letter.

21 To be frank, sometimes much of defendants' letter is  
22 kind of pro forma based on prior productions; and so it would  
23 be helpful to get a better sense of those production -- those  
24 privilege workflow figures as defendants produce them.

25 THE COURT: All right. That's fine. That will be

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1 done.

2 Mr. Thornburgh, anything else?

3 MR. THORNBURGH: Not at this time, your Honor.

4 Thank you.

5 THE COURT: Okay. Mr. O'Mara or Mr. Weiss, anything  
6 further in terms of the motion to compel?

7 MR. O'MARA: No, your Honor, not for Tim O'Mara.

8 MR. WEISS: No, your Honor. Thank you.

9 THE COURT: Okay. So let's go to the issue of  
10 bifurcation. And Ms. Sweeney, do you want to address this?

11 MS. SWEENEY: Sure. Thank you, your Honor.

12 Yes. So plaintiffs proposed to defendants that we  
13 have separate trials on liability and the remedies phase. And  
14 defendants are correct that we are still discussing this issue.  
15 And plaintiffs, of course, have no objection to full briefing  
16 on the topic.

17 But we wanted to bring it to your Honor's attention  
18 now because even though it's a trial issue, it has a big impact  
19 on expert reports which are due at the end of July. We believe  
20 that it would be far more efficient if the equitable remedies,  
21 for example, are decided at a subsequent and later proceeding,  
22 because that would enable the reports and the testimony to be  
23 tailored to whatever findings of fact and conclusions are made  
24 in the first trial on liability.

25 So we're still discussing it with the defendants, we

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1 are happy to brief this motion, and we just wanted to alert  
2 your Honor that that is coming. And so we would hope to file a  
3 motion in the near term so that it can be decided in time that  
4 if your Honor bifurcates remedies, for example, we can take  
5 advantage of that in the expert work that we do.

6 THE COURT: All right. And Ms. Sweeney, if you could,  
7 could you just give me a lay of the land in terms of how the  
8 plaintiffs see it at this point? I'm not holding you to  
9 anything, but just give me the plaintiffs' perspective on how  
10 we would proceed in terms of the trial of this case.

11 MS. SWEENEY: Sure. And I defer to my colleague from  
12 the state Mr. Gitlin to address any damages issues, because the  
13 United States, of course, does not have any damages claims.

14 But so what we have -- what we propose and we have  
15 proposed to the defendants is that there be an initial trial on  
16 liability, and that would presumably be a jury trial, assuming  
17 that all of the damages claims brought by the states remain  
18 intact. And then there would be a period of time -- in other  
19 cases that the United States has brought, other antitrust  
20 cases, there has been a period of time following the liability  
21 rulings so that the experts can then prepare their reports.  
22 There would then be additional experts discovery. Hopefully,  
23 no additional fact discovery, but I suppose that there could be  
24 a special application made to conduct a little more fact  
25 discovery. But there would be new reports by the experts on



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1 proposed relief that was tailored to fit with the liability  
2 rulings. And then a subsequent trial before your Honor on  
3 equitable remedies with that expert testimony.

4 THE COURT: And that's all assuming that you prevail  
5 at the first trial, right?

6 MS. SWEENEY: Correct. And it certainly seems like --  
7 especially from defendants' point of view -- the attractive  
8 nature of this proposal; that is, if we don't prevail on all of  
9 our claims, then there's no need to have expert testimony on  
10 remedies for certain claims. And if we don't prevail on any of  
11 our claims, of course there needn't be a second phase at all.

12 THE COURT: All right.

13 Mr. Pfeiffer, if you want to address it, the issue,  
14 you can; but it seems like there's nothing for the Court to  
15 rule on at this point.

16 MR. PFEIFFER: I think that's right, your Honor. This  
17 is Al Pfeiffer for the defendants. I think that's right.  
18 There's nothing to really address right now.

19 What I would say is we -- as we've told the  
20 plaintiffs, we're certainly more than happy to continue to  
21 discuss this with them as their proposal coalesces. The  
22 initial disclosures were pretty unformed, to the point where  
23 the federal defendants said they took no position on what the  
24 state plaintiffs said they were interested in having this look  
25 like. So we hope things will evolve further from there and

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1 we'll be happy to address that.

2 We do think that to the extent the parties are not  
3 able to reach an agreement on this, this is obviously a  
4 significant procedural matter that affects the defendants'  
5 rights both from a deficiency and a fairness perspective under  
6 Rule 42. And we would expect this to be briefed and ideally  
7 argued before we're decided, assuming we can't come to an  
8 agreement.

9 MR. GITLIN: Your Honor, this is Adam Gitlin, for the  
10 state plaintiffs, just to respond to what Mr. Pfeiffer said.

11 With respect to the state damages claims, obviously we  
12 were not entirely sure how the Court was going to dispose of  
13 the motion to dismiss and know whether or not the damages  
14 claims were proceeding. But we're continuing to meet with --  
15 meet and confer with defendants about how we could reach  
16 agreement on a structure. And, you know, as soon as we know  
17 exactly what the Court's order says, I think we'll be able to  
18 either come to an agreement or brief it, as I think all parties  
19 are ready to.

20 THE COURT: All right.

21 So, Mr. Pfeiffer, would you propose that the parties  
22 meet and confer over the next few weeks and, within 30 days, if  
23 there remains a dispute, a motion to be filed at that juncture?  
24 Would that make sense?

25 MR. PFEIFFER: Your Honor, this is Al Pfeiffer.

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1 That makes sense to me.

2 THE COURT: All right.

3 Ms. Sweeney, Mr. Gitlin, does that make sense on your  
4 end?

5 MS. SWEENEY: Yes, your Honor, that makes sense.

6 THE COURT: All right. So that resolves that issue.

7 And then the last issue for this conference was an  
8 amendment to the case management order that both sides agree  
9 on; so we'll include that in our order as an amendment to the  
10 case management order.

11 Now, that leaves the outstanding issue relating to the  
12 preserved or not preserved text and chat messages. And the  
13 relief that's sought by the plaintiffs here, the response by  
14 March 18th to certain questions in the plaintiffs' letter.

15 So what is the defendants' response at this time to  
16 that request? And whoever's going to -- whoever can address  
17 that from the defendants' side, please just give your name  
18 first for the court reporter's benefit.

19 MR. O'MARA: Your Honor, this is Tim O'Mara, for the  
20 defendants.

21 Your Honor, that motion just got filed. And under the  
22 Court's orders, we have till today to respond to that. And we  
23 think it's important for us to be able to respond and file our  
24 response publicly on the docket and for your Honor to consider  
25 our written response before we proceed.

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1 THE COURT: Okay. But it's 2:45 in the afternoon. So  
2 can you give me a sneak preview?

3 MR. O'MARA: The sneak preview, your Honor, is is that  
4 the plaintiffs' position, I think, is misleading and wrong  
5 across a number of respects. I think our preservation of texts  
6 and chats has been robust, and that there's reasonable  
7 explanations for the issues that are being flagged, including  
8 in most instances that the texts that are being flagged were,  
9 in fact, either not responsive or not subject to a hold.

10 That's separate than one of the issues that just  
11 recently came up, which is that one custodian misunderstood the  
12 way that the technology works for how you keep a text, which is  
13 a very different issue. But, in any event, your Honor, we can  
14 go through it. And we're putting that brief together right  
15 now; we'll have it into the Court. We're happy to have a  
16 hearing on it.

17 We are happy to address most of the questions that the  
18 plaintiffs ask. We think they prematurely filed their motion;  
19 we told them we would get them responses. But, in any event,  
20 we would like the opportunity, your Honor, again, to respond  
21 fully; and then we're happy to have a hearing as soon as your  
22 Honor wants it once our brief is in.

23 THE COURT: Well, at this time -- so thank you,  
24 Mr. O'Mara. I know that you haven't put in your written  
25 submission yet.

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1 But what I'll say is that the plaintiffs' sole request  
2 at this juncture is a response to certain questions in Appendix  
3 A. And there are some of these questions that perhaps you  
4 would have a valid objection to, but there are other of these  
5 questions that one could imagine the plaintiffs asking at a  
6 30(b)(6) deposition focused on document collection and  
7 preservation.

8 And so to the extent that those questions would be  
9 ones that the plaintiffs could ask in a deposition of that  
10 kind, and that you would have to provide the answer to, you  
11 might in your response that you file today simply indicate that  
12 you're willing to provide responses to those questions.

13 Because --

14 MR. O'MARA: 100 percent, your Honor, we are going to  
15 do that.

16 THE COURT: Okay. Good.

17 Because I think that would likely moot the request and  
18 obviate the need for a hearing.

19 At this time I don't understand the plaintiffs making  
20 an application for any remedy related to spoliation. And so at  
21 this time there might not be a need for a hearing if you're  
22 able to work out which of these questions you're willing to  
23 respond to. And while March 18th was the date given here, if  
24 it's going to take a couple more days for you to speak to the  
25 appropriate people and provide a response, then the Court would

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1 have no issue with that. So I'll leave you with that guidance  
2 and we can hopefully avoid a hearing at this juncture. And  
3 we'll see what turns up in terms of the responses and any  
4 further inquiry from the plaintiffs.

5 MR. O'MARA: Thank you, your Honor.

6 THE COURT: Okay. Any further issues to be raised at  
7 this time, and then we'll talk about when it's appropriate to  
8 have a follow-up conference here.

9 First from the plaintiffs. And again, just please  
10 identify yourself if you're the one speaking. Maybe,  
11 Ms. Sweeney, I'll hand you the mic if there's any further  
12 issue.

13 MS. SWEENEY: Yes. Thank you, your Honor.

14 Just housekeeping issue. For purposes of amending the  
15 case management plan, we would be happy to work with the  
16 defendants to submit a proposed amendment for your Honor's  
17 signature.

18 THE COURT: All right. That makes sense.

19 Anything else?

20 MS. SWEENEY: Not at this time, your Honor.

21 THE COURT: All right. Anything else from the  
22 defendants? Maybe Mr. O'Mara, if you want to pick up the mic  
23 from Ms. Sweeney.

24 MR. O'MARA: This is Mr. O'Mara, your Honor.

25 No, not for defendants.

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1 THE COURT: All right. So when is it appropriate for  
2 us to have a follow-up conference or do the parties want to  
3 meet and confer and make a proposal to the Court?

4 Ms. Sweeney?

5 MS. SWEENEY: Plaintiffs are happy to make themselves  
6 available at your Honor's convenience, particularly if it's a  
7 video or telephonic conference. But probably two weeks.

8 THE COURT: All right. Mr. O'Mara, why don't you  
9 speak with Ms. Sweeney or someone on your side, whoever the  
10 right person is, and make a proposal.

11 And again, I'll make myself available if it's helpful  
12 to the parties to resolve any issues that have come up. If the  
13 parties talk and it would not be fruitful and would only gobble  
14 up attorney billable hours, then you can let me know that a  
15 hearing is not warranted or needed at the time. Okay?

16 MR. O'MARA: Thank you, your Honor.

17 MS. SWEENEY: Thank you, your Honor.

18 THE COURT: Thank you, everyone, for joining.

19 We are adjourned.

20 \* \* \*